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Supreme Court of the United States

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER, a National Banking Association,

Appellant,

vs.

HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLEE

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APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLEE

STATEMENT OF CASE

We are unwilling to accept appellant's exhaustive statement of the case without qualifications, since it covers many matters and details which were neither in issue nor presented to the State Court for determination. Therefore, in lieu of appellant's compendium, we submit our own statement, as follows:

First: Jurisdiction is invoked in this cause solely upon the issues of fact raised in the pleadings and determined by the decision of the State Court, namely: whether or not appellant, being a national bank, organized and operating under the Federal Banking laws, when engaging in the safety deposit box business as an adjunct to its banking

business, is a federal agency or is engaged in carrying out a federal function so that the Public Revenue Service Tax Act of the State of Colorado, when applied to the safety deposit box business, would, (a) impose a burden upon the bank's character and functions as an agency of the federal government, or, (b) constitute an attempt to tax a national bank contrary to the ban of federal statutes.

Second: The issues of fact and the law applicable thereto found and determined in this cause, are succinctly set forth in the opinion of the Supreme Court of the State of Colorado in its decision in the matter of *Bedford, Treasurer vs. Colorado National Bank,* (104 Colo. 311, 91 Pac. (2d) 469, Tr. Rec. pages 19 to 29) as follows:

> "This action was brought by plaintiff in error (Bedford) under the Uniform Declaratory Judgment Act '35 C.S.A., ch. 93, Secs. 78 to 92, to obtain a judicial declaration that the State has power to compel national banks to collect and remit service taxes upon depository services performed by such banks to the public in compliance with the Public Revenue Service Tax Act of 1937. (S.L. '37, ch. 240)
>
> "Upon the filing of an amended petition, defendant in error, (the bank) answered, to which answer plaintiff in error demurred. The demurrer was overruled. It was previously agreed that the party against whom the ruling on demurrer was made, would stand upon such ruling. Plaintiff in error made that selection, and the Court decreed 'that all services performed by defendant in operating safety deposit box vaults are exempt from taxation' under the Public Revenue Service Tax Act, supra. Reversal of that decree is sought here, *and the assignment of errors, in substance, raised two questions, namely: (1) Upon whom is the serv-*

ice tax imposed, the party rendering the service or the one who uses it? (2) Does the requirement to collect and remit the tax upon depository services constitute a burden upon or an interference with the proper functions of a national bank as a governmental agency?" (Transcript record, pages 19 and 20. Italics are ours.)

In reaching its decision, the Supreme Court of the State of Colorado said:

"There is no congressional requirement that a national bank conduct a safety deposit box service. The relationship created under such service is that of bailor and bailee and not that of debtor and creditor. Tuckerman v. Mearns, 262 F. 607. A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business."

(Transcript record, page 26.)

"We conclude, that the tax created by the service tax act is imposed, not upon the bank but upon the user of the service, and that the requirement that the bank collect and pay the same to the treasurer, under the circumstances detailed in the act, is not an unconstitutional burden upon, nor does it unlawfully interfere with, the bank as a governmental instrumentality." (Transcript record, page 29.)

The case was remanded to the District Court of the City and County of Denver, Colorado, the trial court, under the following instructions:

"Now, therefore, this cause is remanded to you, the said District Court, in and for the said City and County of Denver and State aforesaid, that such

further proceedings may be had in said cause as shall conform to the judgment of this Court, entered as aforesaid, as also with the opinion filed therein."

The trial court, in response to such remittitur, did thereupon enter judgment in conformity therewith, from which judgment, in order to perfect its appeal to this Court, the bank took exception and appealed again to the Supreme Court of the State of Colorado as plaintiff in error, under the title of *"Colorado National Bank vs. Bedford, Treasurer."* On the 8th day of January, 1940, the Supreme Court of the State of Colorado rendered its decision in this cause, affirming its former decision in the matter of *Bedford, Treasurer vs. Bank*, supra, in the following language:

> *"The issues presented in this case are in all respects identical with those raised in Bedford, State Treasurer v. Colorado National Bank*, 104 Colo. 311 (91 P. (2nd) 469), in which our holding was adverse to the contentions advanced by plaintiff in error bank. Consistently with our conclusions therein announced, the judgment here under consideration is affirmed." (Transcript record, page 41. Italics are ours.)

These two cases, which are made a part of the record in this cause, constitute one and the same cause from which this appeal is taken. The issues of fact presented therein and determined by the Supreme Court of the State of Colorado in rendering its decisions adverse to appellant, are confined solely to the questions:

First: Whether the Public Revenue Service Tax Act of the State of Colorado imposes a tax upon the user, and

Second: Whether a national bank as such, when it conducts a safety deposit service is entitled to immunity.

SUMMARY OF ARGUMENT

I.

There is no federal question involved to warrant an assumption of jurisdiction by this Court.

We submit the propositions: (1) that the highest court of the State, (the Supreme Court of the State of Colorado) having construed a state statute, (the Colorado Public Revenue Service Tax Act) and made findings of fact in connection therewith, the Supreme Court of the United States will not, on appeal, disturb such construction and will be bound by the findings of fact; and (2) that the record fails to disclose facts presenting a federal question which would warrant assumption of jurisdiction by this Honorable Court.

Rinn v. Bedford, 102 Colo. 475; 84 Pac. (2d) 827;
R.S. 5219 *as amended*, 12 U.S.C.A. Sec. 548;
Farncomb v. City of Denver, 252, U. S. 7, 40 S. Ct. 271;
Alvard v. Johnson, 282 U.S. 509, 51 S. Ct. 273;
First Natl. Bank v. Anderson, 269 U.S. 341, 46 S. Ct. 135;
Gully v. Bank in Meridian, 299 U.S. 109; 57 S. Ct. 96.
Guaranty Tr. Co. v. Blodgett, 287 U. S. 509, 77 L. Ed. 463.

II.

The Public Revenue Service Tax Act of Colorado imposes a tax upon the user.

The Public Revenue Service Tax Act of the State of Colorado, by making it unlawful for the performer of the taxable services to include the same in his charges, imposes a tax upon the user of the services. Therefore, the Act is in no sense a tax upon the bank.

Session Laws Colorado '37, ch. 240;
Session Laws Colorado '39, ch. 158;
Bedford, Treasurer v. Bank, 104 Colo. 311; 91 Pac. (2d) 469;
McGoldrick v. Berwind-White Coal Min. Co. 60 S. Ct. 388.

III.

The business of operating safety deposit boxes is not a banking function, but is a business purely incidental to banking.

We submit the proposition that the safety deposit box business is not listed among the banking powers conferred by the federal statutes; that the relationship existing between the bank in the conduct of a safety deposit box business and the renters of the boxes being that of bailor and bailee, and the bank having no control or access to the contents of such boxes for use as banking assets, such business is purely an incident to the banking establishment. A national bank, therefore, engaging in such business is engaging in a private operation, and is subject to all state laws affecting that occupation.

Tuckerman v. Mearns, 262 Fed. 607;

R. S. 5136—*as amended*, 12 U.S.C.A. Sec. 24;

Kimen v. Atlas Exchange Bank, 92 Fed. (2d) 615;

First National Bank v. Missouri, 263 U.S. 640, 44 S. Ct. 213.

IV.

The safety deposit box business renders a service which is a proper subject for taxation.

The safety deposit box business, in fact, constitutes a rental of space to the public, and is therefore a service taxable by state law. Section R.S. 5219 is designed solely to prevent state taxation of bank shares, which might be discriminatory to national banks, and is limited to the subject therein enumerated. The Public Revenue Service Tax Act

of Colorado is not a tax on bank shares, nor upon bank property, and therefore is not within the prohibition of that statute.

Rinn v. Bedford, 102 Colo. 475; 84 P. (2d) 827;
James v. Dravo Constr. Co., 302 U.S. 134, 58 S. Ct. 208;
Silas Mason Co. v. Tax Com., 302 U.S. 186; 58 S. Ct. 233;
R.S. 5219 amended, Sec. 3, 12 U.S.C.A. Sec. 548;
Clement National Bank v. Vermont; 231 U.S. 120.

V.

The burdens imposed by the Public Revenue Service Tax Act of Colorado are not repugnant to the United States Constitution or Laws, nor discriminatory. These issues are not properly before this Court.

This cause was decided upon the sole issues as to where the tax was placed, and whether a bank is a federal agency. No other issues being raised or determined by the trial court, constitutional questions cannot be injected herein.

We submit the proposition, however, that the tax imposed by the Public Revenue Service Tax Act of Colorado, is a proper exercise of a state sovereign power to levy and collect taxes, and that the method of collection of those taxes is constitutional and lawful.

Public Revenue Service Tax Act, Section 19, S. L. '39 Colo. ch. 158;

James v. Dravo Constr. Co. 302 U.S. 134, 58 S. Ct. 208;
McGoldrick v. Berwind-White Co., 60 S. Ct. 388;
Covington v. Tax Com. (Ky) 257 Ky. 84, 77 S.W. (2d) 386;
Pierce v. Society of Sisters, 268 U.S. 510; 45 S. Ct. 571;
Northwestern Life Ins. Co. vs. Riggs, 203 U.S. 243;

THE ARGUMENT

I.

THERE IS NO FEDERAL QUESTION INVOLVED TO WARRANT AN ASSUMPTION OF JURISDICTION BY THIS COURT

1. The constitutionality of the Public Revenue Service Tax Act of Colorado was not and is not challenged by this cause. On the contrary, the bank is bound by the decision of the Supreme Court of the State of Colorado in the case of *Rinn v. Bedford* (102 Colorado 477) sustaining the constitutionality of the Colorado Service Tax Act which recognizes the right of the State to enact and enforce such legislation. Appellant, however, claims immunity from the Service Tax Act by virtue of its being a federal institution shielded from State taxation through congressional action (R.S. 5219). Determination of that question called for an interpretation, not only of state, congressional laws, but for the establishment of the status of the bank. In fixing that status, the Colorado court found that the bank, when it engages in the business of renting safety deposit vaults, is not engaged in a banking business, that the tax imposed by the statute was a tax upon the user or lessee of its safety vaults, and that the bank in renting such vaults was not discharging a federal function. From these facts, the Colorado court then held as a matter of law that appellant was and is subject to the provisions of the Service Tax Act and denied immunity.

In cases like the one at bar, involving the construction of State laws by State courts, this Honorable Court has consistently held that it will not disturb the construction placed by the state courts upon its own statutes and that it will be bound by the State courts' findings of fact.

In the case entitled "*Farncomb v. City of Denver* (252 U.S. 7; 40 S. Ct. 271)" it is said:

> "This Court, when dealing with the constitutionality of State Statutes, challenged under the Fourteenth Amendment, accepts the meaning thereof as construed by the highest court of the State. *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U.S. 419, 427."

Again, when called upon to construe a State statute taxing an irrevocable gift inter vivos as a gift causa mortis, this Court said:

> "Since the court below construed the Act of 1923 without regard to the Act of 1929, as embracing the event sought to be taxed and since in that view the question of contract impairment does not arise, we are bound by the decision of that court as though the meaning as fixed by the court had been expressed in the statute itself in specific words."

(Guaranty Tr. Co. v. Blodgett, 287 U.S. 509, 77 L. Ed. 463.)

Applying these rules to the decisions of the Colorado Supreme Court which appellant seeks to review, it is obvious that those decisions involved no federal questions for consideration by this Honorable Court.

2. The fact that appellant is a creature of Congress engaged in a business declared by Congress to be federal in character, does not, of itself, make it immune from the operation of State laws, and when it engages in a business foreign to the business for which it was primarily organized and wholly unnecessary to the fiscal policy of the United States, it loses its character as a federal instrumentality, and so far as that business is concerned is wholly amenable to State laws.

Counsel for appellant oppose this proposition by the citation of numerous and sundry cases, all of which involve attempts by States to tax national banks on their property or to fly in the teeth of the Congressional prohibition

against discriminatory taxes upon national bank shares and securities; or to levy taxes which would burden or impair the functions of a federal instrumentality in the exercise of a federal function, (eg. Pittman, Clerk v. H.O.L.C. 60 S. Ct. 18; Federal Land Bank v. Crosland 261 U.S. 374; Bank v. Bennett 284 U.S. 239) and seek to avoid those cases which have held that the federal instrumentalities are amenable to State laws.

We, therefore, as supporting our contention that no federal question is herein involved, refer specifically to the case of *Alvard v. Johnson* (282 U.S. 509, 51 S. Ct. 273; 75 L. Ed. 496). In that case the taxpayer operated an automotive stage line. Two-thirds of his gross receipts, upon the whole of which he was taxed were derived from carriage of United States Mail and the remainder from carriage of passengers and freight. He claimed immunity from State taxation as a federal instrumentality because of his mail contract. The court said:

> "Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely." (Alvard v. Johnson—(282 U.S. 509, 514)

Here, as there, the burden of the Service Tax Act, of which appellant complains, "laid upon the property employed, affected operations of the Federal Government only remotely."

Again, in the case of *First National Bank v. Anderson*, 269 U.S. 341, this Court, in applying the prohibition of Section 5219 R.S., qualified the operation of that statute, as follows:

"1. The purpose of the restriction is to render it impossible for any State, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks by favoring shareholders in State banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. (citations)

"2. 'Other monied capital' in the restriction, is not intended to include all monied capital not invested in national bank shares, but only that which is employed in such ways as to bring it into substantial competition with the business of national banks. (citations)

"3. Monied capital is brought into such competition where it is invested in shares of state banks or in private banking; and also where it is employed substantially as in the loan and investment feature of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment. (citations)"
(First National Bank v. Anderson, 269 U.S., 341)

Certainly, the investment of a national bank in safety deposit vaults for rental to the public, is not an investment "by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment." (*First National Bank vs. Anderson*, 269 U.S. 341, 46 S. Ct. 135)

Finally, in the case of *Gully v. First National Bank of Meridian*, 299 U.S. 109, 57 S. Ct. 96, this Court, in denying immunity to the bank, said:

"That there is a federal law permitting such taxation, (a state obligation for liabilities assumed by the defendant bank for monies for State, County and School District taxes) does not change the basis of the suit which is still the statute of the state, though the federal law is evidence to prove the statute valid * * *. Here the right to be established is one created by the state. It is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. *By unimpeachable authority a suit brought upon a state statute does not arise under an Act of Congress or the Constitution of the United States because prohibited thereby.*" (Gully v. First Natl. Bank, 299 U.S. 109, 57 S. Ct. 96—Italics are ours).

It is apparent that a federal instrumentality cannot claim immunity from the operation of state laws because of its federal character, where those state laws operate upon such agencies in their private capacity and do not affect their federal functions. These being the only questions presented by this case, and the Supreme Court of the State of Colorado having construed the Colorado Service Tax Act and applied the same thereto, no federal question is presented for consideration by this Honorable Court, and jurisdiction thereof should be denied.

II.

THE PUBLIC REVENUE SERVICE TAX ACT OF COLORADO IMPOSES A TAX UPON THE USER

That the tax imposed by the *Public Revenue Service Tax Act of Colorado* (S.L. '37 ch. 240 and S.L. '39 ch. 158) is a tax levied upon and paid by the user or beneficiary of the services, is not only the expressed intent and language of the Acts themselves, but is a fact determined in the instant

case by the Supreme Court of the State of Colorado in its decision in the matter of *Bedford, Treasurer, vs. Bank.* (104 Colo. 311, 91 Pac. (2d) 469)

The 1939 enactment of the Colorado Service Tax Act is a re-enactment of the 1937 law. In both these laws, tax is defined as follows:

"Section 2. Definitions.

(f) The term 'tax' means either the tax payable by the person procuring or for whose benefit a service is rendered or performed subject to tax, or the aggregate amount of taxes due from the person rendering, performing or furnishing services during the period for which he is required to report his collections, as the context may require."
(Public Revenue Service Tax Act, ch. 240, Sec. 2 (f), S. L. '37 page 1145)

Section 5 of that Act, a re-enactment of the '37 law, levies the tax.

"Section 5. From and after the effective date of this Act, there is hereby levied and imposed upon the services specified in this Act, and measured by the amount paid therefor, and there shall be collected and paid:

(c) A tax equivalent to 2% of the value of services rendered or performed by any person engaging or continuing in any of the following businesses * * * banks, finance companies, trust companies and *depositories* * * *."
(Section 5 (c) ch. 240 S. L. Colo. '37 pages 1150-1151. Italics are ours.)

The performer of the services is expressly forbidden by the law to absorb the tax either directly or indirectly, and is required to collect the tax from the user or bene-

ficiary along with and in addition to his compensation for the same.

Section 6 of the *Public Revenue Service Tax Act of Colorado '39* is a re-enactment of the same section of the Service Tax Act of 1937. It prescribes the duties of the person rendering or performing the services, and provides, among other things, as follows:

> "(d) It shall be unlawful for any person rendering or performing services to advertise or hold out or state to the public or to any user, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by him, or that it will not be added to the value of the service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor." (ch. 158, Sec. 6(d) S.L. Colo. '39)

As hereinabove noted, the Supreme Court of the State of Colorado in the case at bar, was called upon for a judicial determination upon whom the service tax of Colorado was imposed namely: the party rendering the service or the one who uses it. (Bedford vs. Colo. Bank, 104 Colo. 311, 313)

The Court then proceeds with an analysis of the statutes hereinabove set forth, and concludes that the tax imposed is upon the user, in the following language:

> "In the instant case, the direct tax burden is not upon the Bank. It is the state's agent to collect and it is compensated for that service. The tax, when collected by the bank, is the property of the state which it holds in trust for the sole use and benefit of the state until paid to the Treasurer, as provided by law. While the Bank is liable to the

state for the tax, the Act itself is so worded that the Bank does not carry any of the tax burden unless it refuses to comply with certain terms of the Act. To that extent, as applied to the Bank, it is a taxpayer within the meaning of Section 2(e) supra, and the liability is a tax within the meaning of Section 2(f) supra. We conclude that the tax created by the Service Tax Act is imposed, not upon the Bank, but upon the user of the service, and that the requirement that the Bank collect and pay the same to the Treasurer under the circumstances detailed in the Act, is not an unconstitutional burden upon, nor does it unlawfully interfere with the Bank as a governmental instrumentality. The constitutional immunity claimed by the Bank, does not apply." (Bedford v. Bank, 104 Colo. 311, 324)

The same conclusion in connection with the burden of the New York City sales tax was recently reached by this Honorable Court in the case of *McGoldrick, Comptroller v. Berwind-White Coal Mining Company*, decided January 29, 1940, as yet unreported in official reports. (60 S. Ct. 388) We quote at length from that decision:

"The question for decision is whether the New York City tax laid upon sales of goods for consumption as applied to respondent, infringes the commerce clause of the Federal Constitution.

* * * * * * * * *

"Pursuant to this authority the municipal assembly of the City of New York adopted Local Law No. 24 of 1934 (published as Local Law No. 25), since, annually renewed, which laid a tax upon purchasers for consumption of tangible personal property generally (except foods and drugs furnished on prescription), of utility services in

supplying gas, electricity, telephone service, etc., and of meals consumed in restaurants. By Sec. 2 the tax was fixed at 'two percentum upon the amount of the receipts from every sale in the City of New York', 'sale' being defined by Sec. 1 (e) as 'any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor'. Another clause of Sec. 2 commands that the tax 'shall be paid by the purchaser to the vendor for and on account of the City of New York'. By the same clause the vendor, who is authorized to collect the tax, is required to charge it to the purchaser, separately from the sales price; and is made liable, as an insurer, for its payment to the city. By Secs. 4 and 5 the vendor is required to keep records and file returns showing the amount of the receipts from sales and the amount of the tax. In event of its nonpayment to the seller the buyer is required, within fifteen days after his purchase, to file a tax return and to pay the tax to the Comptroller who is authorized by Sec. 2 to set up a procedure for the collection of the tax from the purchaser. Purchases for resale are exempt from the tax, and a purchaser who pays the tax and later resells is entitled to a refund.

The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price. *Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him.* It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or

an agreement within the state 'consummated' there, for the transfer of title, or possession. The duty of collecting the tax and paying it over to the Comptroller is imposed on the seller in addition to the duty imposed upon the buyer to pay the tax to the Comptroller when not so collected. Such, in substance, has been the construction of the statute by the state courts.

* * * * * * * * * *

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau, 303 U.S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. *Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited.* The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. *An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate*

commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it.

* * * * * * * * *

"Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. Brown v. Houston, supra; Coe v. Errol, 116 U.S. 517; Pittsburg & So. Coal Co. v. Bates, 156 U.S. 577; American Steel & Wire Co. v. Speed, supra, 520; General Oil Co. v. Crain, 209 U.S. 211; Bacon v. Illinois, 227 U.S. 504. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements." (McGoldrick v. Berwind-White Co. 60 S. Ct. 355, Italics are ours).

The significant portion of the Berwind decision, supra, aside from its fixing the purchaser of goods as the taxpayer, is that it defines the vendors' (in the instant case the performers') status as that, not of a taxpayer charged with the tax, but as an insurer for the benefit of the state.

It is significant that counsel for appellant, in citing the Berwind case (supra) as their authority, should place

reliance upon language appearing in the dissenting opinion, and we respectfully suggest that the Chief Justice's quarrel with the majority decision is not that it placed the tax upon the user, but that it was a tax upon an article of interstate commerce. Counsel have omitted the Chief Justice's concluding sentence which we quote as follows:

> "From any point of view, the tax contested is laid upon *interstate sales.*" (McGoldrick, v. Berwind-White Co., 60 S. Ct. 388, Italics are ours)

The Colorado Service Tax Act, therefore, by imposing the service tax upon the beneficiary of the services, fails to impose a tax upon the bank. The Bank is an insurer and a trustee of the monies which it must collect from the renters of its safety deposit vaults, and it receives 3% of its collections as compensation therefor. The Colorado Service Tax Act, therefore, levies no tax upon the bank, but is purely, so far as the Bank is concerned, an administrative statute laying down a course of conduct to be followed by all who engage in such businesses, whether they be national banks or private institutions. This law, therefore, infringes none of the Bank's constitutional rights.

III.

THE BUSINESS OF OPERATING SAFETY DEPOSIT BOXES IS NOT A BANKING FUNCTION, BUT IS A BUSINESS PURELY INCIDENTAL TO BANKING.

Renting safety deposit vaults is not banking. While the vault installation may be a part of the bank building and thus be a part of the bank's physical assets the same as its typewriters and adding machines, the test to be applied is the purpose and use to which it is put. That they are not a necessary adjunct to bank business is apparent from the fact that a bank can, and many banks do, function without them. They are sidelines to the trade. Their purpose and

use is to serve, not the bank in the furtherance of its fiscal powers, but to provide convenient and safe storage space for public rental. They are installed by banks as a competitive feature to attract depositors and the bank exacts a toll for their use. The relationship between the bank and safety deposit box holders is the same as any other bailor for hire. The valuables placed in such depositories are the sole property of the depositor. No pledge, escrow, or trust relationship exists. It is a pure bailment and the subject of the bailment is beyond the control of the bank, its officers, agents, examiners or receivers. When the bailment ends, either voluntarily or the bailor's insolvency, the property in bail must be returned *in kind* or its loss by negligence accounted for.

Such bailments are not special deposits altho safety deposit vaults may be called depositories, but that does not make them banking functions. As the Court observed in the case of *Tuckerman v. Mearns*, 262 Fed. 607:

> "Nor does counsel for plaintiff inmprove his jurisdictional dilemma by calling this a special deposit. A special deposit implies the custody of property without authority in the custodian to use it, and the right of the owner to receive back the identical thing deposited."
>
> Tuckerman v. Mearns (262 Fed. p. 610)

Indeed, it is because of the very fact that safety deposit vaults are 'depositories' that the State of Colorado may tax the services rendered by them. (Opinion Bedford, Treasurer v. Bank, Tr. Rec. 26)

A depository service rendered by a national bank is purely incidental to and not a necessary incident to its banking business. The powers of National Banks are enumerated in *R.S.* 5136, cited by counsel, both general and

necessary incidental. The power to engage in the safety deposit service is not among them. Congress, by this exclusion has, therefore, recognized the fact that such services are purely incidental to banking. Indeed, it is no part of banking as such at all.

In the case entitled *Kimen v. Atlas Exchange Natl. Bank*, (92 Fed. (2d) 615) on the subject of powers of National Banks, the Court said:

> "National banks may rightfully exercise only such powers *as are expressly granted and such as are necessarily incidental* to the effectuation of their charter of purposes. Incidental powers can avail neither to create powers which expressly or by reasonable implications are withheld nor to enlarge the powers granted. They are inferred and exist only to carry into effect such powers as are granted. First Natl. Bank v. Missouri; 263 U. S. 640; 44 S. Ct. 213; 68 L. Ed. 486." (Kimen v. Bank, 92 Fed. (2d) 615, Italics are ours)

The provisions of *R.S.* 5136 relating to safety deposit boxes is not a power conferred but is a permission to national banks to conduct such a business under *separate* state organizations, with limitations and the provisions of *Sec.* 5228 *R.S.* prohibiting national banks from continuing business after notice by the controller "except to receive and safely keep money belonging to it *and to deliver special deposits*" clearly recognizes that safety deposit box service is separable both as a banking business and as the service of a governmental instrumentality.

Counsel for appellant rely on *"Bank of California v. Portland"* (157 Ore. 203, 69 P. (2d) 273,) as their authority to the contrary. That case, however, invokes a city license ordinance upon the national bank itself, to be paid by the bank for the privilege of conducting the safety deposit box

business. It was a direct tax upon the bank, an admitted instrumentality of the federal government. Here we have a tax, not upon the bank but upon the user of its services. The Portland case is neither in point nor decisive of any issue herein presented.

IV.

THE SAFETY DEPOSIT BOX BUSINESS RENDERS A SERVICE WHICH IS A PROPER SUBJECT FOR TAXATION

The *Public Revenue Service Tax Act of Colorado*, being an excise tax upon the services rendered by the businesses and occupations listed for taxation, is, therefore, a proper exercise of state sovereignty. In Rinn v. Bedford, the Supreme Court of Colorado, in connection with a general challenge to the constitutionality of the Public Revenue Service Tax Act, said:

> "We consider next the question whether the act may lawfully require the plaintiff as an attorney at law to collect the tax from those for whom he himself performs services. The argument that he is thereby unlawfully constituted a collector of taxes against his will, and that the compensation provided for the collection is inadequate and confiscatory, must fall, for there is no distinction in principle between such collection and the collection, for instance, of a gasoline tax, which is collected by the seller from the purchaser as part of the purchase price and thereupon turned over to the government. That the tax under consideration is a service tax and the other a sales tax can make no material difference. Both are excise taxes. Their creation is within the plenary power of the General Assembly, in the absence of specific constitutional inhibitions. The service tax is certainly not a

property tax, as claimed by the plaintiff, and consequently constitutional provisions which, like section 11 in article X of the Colorado Constitution for instance, safeguard the rights of private property are not in point. The method of collection is not shown to be unlawful, in fact it seems the only practical method; but this again is purely a matter of policy left by our Constitution to the discretion of the legislative branch of our state government. the wisdom or unwisdom of the legislation is not for us to decide."

(Rinn v. Bedford, 102 Colo. 475, 479, 480)

The *Public Revenue Service Tax Act of Colorado*, being an excise tax upon services rendered or performed, is not and cannot be construed as a tax upon the bank, its shares of stock or its property, nor does it lay a direct burden upon the federal government or its instrumentalities.

The same hue and cry was raised over a tax imposed by West Virginia upon gross receipts of contractors under contracts with the United States government, resulting in the case of *James v. Dravo Construction Company.* (302 U.S. 134; 58 S. Ct. 208). This Honorable Court in the James case, supra, made an exhaustive analysis of the questions as to where and when state laws impose burdens upon the government and held that "the West Virginia tax, so far as it is laid upon the gross receipts of respondent derived from its activities within the borders of the state does not interfere in any substantial way with the performance of federal functions and is a valid exaction." (*James v. Dravo Construction Co.* 302 U.S. 134). The same conclusion was reached as to the occupational tax of the State of Washington in this Honorable Court's decision of "*Silas Mason Co. v. Tax Division.*" (302 U.S. 186, 58 S. Ct. 233).

Appellant's objection that the tax law invoked is prohibited by the provision of *R.S.* 5219, is likewise without foundation. That Act prohibits taxation of bank shares except in conformity to the standards set up in the Act. Section 3 thereof expressly provides:

> "Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed." (R.S. 5219 amended, Sec. 3; 12 U.S.C.A. Sec. 548).

In the case of *Clement National Bank v. Vermont*, 231 U.S. 120, the court held that a state tax on savings deposits was a tax upon the property of the depositors, and in spite of the fact that under the same law the bank might make annual returns for its depositors and pay the tax itself out of earned interest on the deposits, the law was held constitutional and not forbidden by *R.S.* 5219. In construing the federal statute the court said:

> "To be opened to such an objection, it must appear that the scheme of taxation constitutes an injurious discrimination. Even in the case of shares of the capital stock of national banks, which cannot be taxed save with the consent of Congress (citation) taxation by the State is expressly permitted if it is not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. Rev. Stat. Sec. 5219. The object is to prevent hostile discrimination and for this purpose a standard is fixed. (Citation) With respect to the taxation of depositors' credits, the Federal statute does not prescribe a rule; and the property being normally subject to the State's taxing power, there is no warrant for implying a restriction which

would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory." (Clement v. Bank, 231 U.S. 120)

In the instant case, therefore, the services rendered by safety depositories being normally subject to the state's taxing powers and the rate of tax on that service being uniform, there is no warrant for implying restrictions upon the exercise of that power in cases where national banks are concerned. Indeed, if appellant's contention is correct the only discrimination which would arise would be in favor of the national banks and against a state association operating such a business.

V.

THE BURDENS IMPOSED BY THE PUBLIC REVENUE SERVICE TAX ACT ARE NOT REPUGNANT TO THE UNITED STATES CONSTITUTION: NOR DISCRIMINATORY. THESE ISSUES ARE NOT PROPERLY BEFORE THIS COURT.

There is no discrimination in the tax imposed. It applies to all banks, state and national, and to any person conducting a safety deposit box business independent of banking operations. (*James v. Dravo Construction Co.* 302 U.S. 134, 58 S. Ct. 208). Nor may counsel for appellant claim discrimination because of an alleged change in the Treasurer's rulings. Under Section 19, Public Revenue Service Tax Act of Colorado, the Treasurer is charged with the enforcement and administration of the Act and clothed with the powers to *adopt*, *amend* and *rescind* general and special rules for the ascertainment, assessment and collection of the tax. (*Sec.* 19, *Chap.* 158, *S.L. Colo.* '39). The bank being amenable to the state law, cannot be heard to complain because the Treasurer did his duty in the enforcement of that law.

Appellant contends that the *Public Revenue Service Tax Act* threatens its property with a lien and places a burden upon it in its requirement that the bank collect and pay the tax to the state contrary to the federal Constitution. They cite as their authority the "Opinion of the Justices" (New Hampshire).

> "3 By the bill the tax is placed upon the purchaser. Although the seller is required to guarantee, collect, account for, and pay it, he is also required to add it to the price of the article sold and may not assume, absorb or refund it. The duty thus devolved upon him to act as the collector of the tax *without adequate compensation for the service*, a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. It would not be a service incidental to the ascertainment of his own taxes." (Opinion of Justices, N.H. 190 Atl. 801,804—italics are ours.)

The Justices' objections to the tax is because adequate compensation is not afforded the collector. Section 6 (a) of the *Public Revenue Service Tax Act of Colorado* provides that every person rendering or performing services shall be liable for the payment of the entire amount of the tax, shall make monthly returns and remittances of collections to the state treasurer *"less three (3) per cent thereof to cover the expense of the person rendering or performing the services in the collection and remittance of said tax."* The Colorado law, therefore, does provide compensation for collection and the unique opinion of the New Hampshire Justices is inapplicable. It should be observed that the New Hampshire opinion is the only opinion of its kind. It flies in the teeth of every sales and service tax act in the nation, and if that be the law, would nullify all state legislation as well as the present federal tax on safety deposit boxes enacted by

Congress (*R.S. Sec.* 1134—1138. *Fed. Code Ann. Vol. 6A p. 96, chap. 16*).

That such is not the law has been too frequently decided to be disputed. All state and federal gasoline taxes have been sustained. As to sales and service taxes, we have the sanction of this Honorable Court in the case of *McGoldrick v. Berwind-White Co.* (60 S. Ct. 388) to the New York City Sales Tax, which makes the vendor, whether he wishes it or not, an insurer charged with the duty of collecting the tax. The matter was considered by the Kentucky Court in the case City of Covington v. Tax Commission. That court said:

> "The first part of the Act is taken up with a definition of terms. Then follows a recitation of the commodities the sale of which is taxed and the sale of each of which, according to the literal language employed, is imposed on the sellers thereof * * * but it is distinctly prescribed in each of the subsections that the seller is required to collect the tax from the purchaser of the commodity taxed. Other and later provisions imposed the duty on him (seller) to make periodical reports to the State Tax Commission of the amount of his gross receipts since the last report with the taxes collected from and paid by the various purchasers and pay into the treasury through the Tax Commission that amount. By Section 4 of the Act he is given the right to deduct from the amount of the tax so collected from his purchasers, 3 per cent as compensation for his services in collecting it." (Covington v. Tax Commission (Ky) 257 Ky. 84, 77 S.W. (2d) 386).

The court then recognized the constitutionality of the Kentucky statute, and held:

> "We have reached the conclusion that the tax was not imposed upon the seller but on the pur-

chaser or buyer of the goods. The seller is required by statute to act as the collecting agency for the state. The law also provides that, for collecting and reporting this tax, *the seller shall be paid for his services.*" (Covington v. Tax Commission, 257 Ky. 84; 77 S.W. (2d) 386—Italics are ours).

Furthermore, the bank, being an artificial person, cannot claim immunity as guaranteed by the Fourteenth Amendment to the Constitution of the United States, since no right of property is involved. *Pierce v. Society of Sisters* (268 U.S. 510; 45 S.Ct. 571) cites with approval the doctrine laid down in *Northwestern Life Ins. Co. vs. Riggs* (203 U. S. 243) when this Honorable Court said:

> 'Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. *The liberty referred to in that Amendment is the liberty of natural, not artificial persons* * * *.* This is too plain for discussion." (Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243. Italics are ours).

Appellant proceeds further with its constitutional contention that the Colorado Public Service Tax Act threatens its property with a lien and distraint process together with additional pains and penalties in the event it should fail or refuse to collect the tax imposed and remit the same to the treasurer. We must here again point out the fact that these contentions are not in the pleadings, or properly before either the Supreme Court of Colorado or this Honorable Court on appeal. Appellant is bound by its answer filed in the original case. That answer contains no allegation that the Public Revenue Service Tax Act is contrary to the Constitution of the United States or the laws of the State of Colorado; (Tr. Rec. p. 5-10) except that the bank is immune by virtue of its being a federal agent. The findings of law

entered by the trial court fail to cover these contentions. (Tr. Rec. p. 16). They were not included in the bill of exceptions and assignments of error filed with the Supreme Court of Colorado in the case of *Bedford, Treasurer, v. Bank,* the subject matter of this appeal. Counsel for appellant, however, did by filing written objections to the entry of judgment by the trial court upon the remittitur, attempt then to inject them into the case and proceeded to incorporate them in their assignments of error and bill of exceptions in their appeal under the title *Colorado National Bank v. Bedford* (Tr. Rec. p. 31-35). That appeal was not from a trial *de novo* but was a continuation of the original case and the appeal was taken from an order of remittitur commanding the trial court to enter its judgment in accordance with the findings of fact and conclusions of law in the original case. We know of no rule of pleading, either state or federal, by which a party by filing objections to the entry of a judgment, can add to or detract from his sworn pleadings so as to inject additional causes of action or defenses.

These constitutional defenses, therefore, here first sought to be presented for consideration, are not in the pleadings, they were not pleaded as defenses in the trial court, they were not determined in the cause now sought to be reviewed and should not be considered or determined in this appeal.

As to the merits of such an argument, we rest upon the proposition that the Public Revenue Service Tax Act is enforceable without the lien or the pains and the penalties of which appellant complains, and that a determination of their constitutionality is wholly unnecessary to a decision herein.

A national bank, even though a federal agent, is subject to apt local state laws and regulations, the same as any other federal agency, and subject to the powers of State sovereignty. The sole restriction is that the state laws shall

not work a discrimination against the agency as applied to similar agencies organized under state laws or constitute a burden which would impair its efficiency in executing federal functions. So said this Honorable Court in numerous decisions and we quote its language in the case of *James v. Dravo Construction Co.*:

> "Respondent has no constitutional right to immunity from nondiscriminatory local taxation, and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the government, and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the government and which the government disclaims."
>
> (James v. Dravo Construction Co., 302 U.S. 134, 58 S. Ct. 208).

CONCLUSION

In conclusion, we submit, that the sole issues involved in the instant case are (1) Who pays the Service Tax, the bank or the user, and (2) Is the bank as a federal agency immune from the operation of the statute. The Supreme Court of Colorado by its decision has resolved those questions adversely to the bank and its construction of the Service Tax Act is controlling. The case, therefore, presents no substantial federal question and jurisdiction of the appeal by this Honorable Court should be refused.

As to the merits of the controversy, we submit, that the tax involved being a tax upon the user of the services is not a tax upon the bank and that when a national bank steps out of its character as a federal agent administering the fiscal policies of the United States and into a field of endeavor which is wholly unnecessary and purely incidental to and aside from the exercise of banking powers,

it loses its cloak of immunity from state laws, and cannot in equity, be permitted to use its federal shield as a sword.

The judgment of the Supreme Court of the State of Colorado, therefore, in the causes presented by this appeal, should be affirmed.

Respectfully submitted,

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8.4

SUPREME COURT OF THE UNITED STATES.

No. 719.—October Term, 1939.

The Colorado National Bank of Denver, Appellant, v. Homer F. Bedford, as Treasurer of the State of Colorado.	Appeal from the Supreme Court of the State of Colorado.

[April 22, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal involves the validity of the Public Revenue Service Tax Act of Colorado.[1] The act, section 5, imposes upon the services specified in the act, a percentage tax based upon the value of the services rendered or performed by any person subject to its provisions.

Section 5(c) imposes a tax equivalent to two per cent of the value of services rendered by "banks, finance companies, trust companies and depositories . . . . ." The person rendering the services "shall be liable and responsible for the payment of the entire amount . . ." Section 6. He is required to remit all taxes collected and due the state from him to the treasurer less three per cent to cover the expense of the service. Under section 6(b) persons rendering or performing the services are required "as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts." By subsection (d) the person rendering the service is forbidden to hold out directly or indirectly that he will assume or absorb the tax. By section 7 the user may recover illegally collected taxes. Where services are rendered which become a part of an article subject to a sales tax, the services are exempt

[1] Session Laws of Colorado, 1937, c. 240, p. 1144. The act was amended and reenacted May 1, 1939. Session Laws of Colorado, 1939, c. 158, p. 526. This later act is not material in this appeal.

and the person performing the service recovers where they are illegally assessed. Section 3. By section 12, all sums paid by the user as taxes are public money and trust funds of the State of Colorado. It is made a misdemeanor, section 17, for any person rendering or performing services to refuse to make the returns required. The state treasurer is made administator of the act and given authority to issue regulations. Section 19. The usual separability clause is contained in the act. Section 22.

The definitions of the act appear in section 2. By its subsection (c) the term "services rendered or performed" is defined as those rendered for a valuable consideration by a person covered by the act for the ultimate user thereof. "The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed." By subsection (e) taxpayer is defined as "any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act." Subsection (h) provides for a credit on future taxes of a tax paid on accounts eventually found worthless.

Under the rules and regulations issued by the treasurer on the Public Revenue Service Tax Act, the service tax is construed as invalid as applied to so-called banking services.[2]

Under rule 27, however, such service as the furnishing of safety vaults by depositories or banks is held to come within the act, and the two per cent tax applies to the charges made for this service. These regulations were approved by the judgment and decree of the trial court and that judgment was affirmed in all particulars by the Supreme Court of Colorado.

While section 4(a) makes it unlawful for any person to render the defined services without "first having obtained a license therefor," the treasurer demands no license fees from a national bank. Such exception was held proper by the lower court.[3]

The appellant here, the Colorado National Bank, was a national banking corporation duly organized and existing under the national banking act. The bank operated a safe-deposit service under its own name and in the building and vaults used for its other banking activities. The rentals received for the use of that portion of its vaults utilized for safe-deposit boxes were reported to the Comp-

[2] Rules and Regulations, Public Revenue Service Tax Act of 1937, No. 10, republished October 27, 1937.

[3] Bedford v. Colorado Bank, 104 Colo. 311, 315.

troller of the Currency as income in the bank; the fixtures employed in the business are part of the assets of the bank and are supervised by the Comptroller of the Currency.

The appellee Bedford, as treasurer of the State of Colorado and administrator of the Service Tax Act, demanded payment from appellant bank of two per cent of the value of the services rendered by the bank to its safe deposit box customers. The bank refused payment and the treasurer brought this action under the Uniform Declaratory Judgments Act (Colorado Stat. Anno., 1935, c. 93, §§ 78-79) for a declaration of rights to the effect that the services performed by the bank are taxable pursuant to the Service Tax Act. The bank answered claiming the state statute as applied to it was repugnant to the Constitution and laws of the United States; setting up the immunity of national banks from state taxation except as permitted by R. S. section 5219;[4] claiming that the safe-deposit business of national banks was authorized by Congress and therefore was part of its federally authorized business, immune from taxation whether the bank or the user of its services is the taxpayer. The bank further contended that even though it is not the taxpayer and the tax burden as such is not unlawful, the burden of collection, report and visitation materially interfere with the performance of its national banking functions. A general demurrer to the answer was filed.

The trial court sustained the bank. The supreme court first affirmed by an equally divided court and then on rehearing reversed[5] and remanded the case to the district court. The trial court entered a second judgment declaring as prayed by the treasurer which judgment was affirmed by the supreme court on the authority of the former decision.

(1) This appeal is here under section 237(a) of the Judicial Code. The treasurer makes the point that as the federal question raised

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[4] 12 U. S. C. § 548

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

[5] Bedford v. Colorado Bank, *supra.*

was the immunity to the exaction of the bank as a federal instrumentality withdrawn from state taxation by congressional action, the determination that the tax was on a non-banking activity foreign to its federal character and on the user of the services eliminated the necessity of a decision on the federal question. As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of state taxation of national banks must accord with R. S. section 5219 and must not interfere with federal functions,[6] it seems clear the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal.[7]

Gully v *First National Bank*,[8] relied upon by the treasurer, dealt with the right to remove to a federal court[9] because the cause of action arose under the federal laws,[10] but the issue here is the right to appeal where a state statute is held valid against a defense of repugnancy to the same laws.[11] The difference is brought out in the *Gully* case, where it is said: "If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense."[12]

(2) The genesis of the present system of national banks is the National Bank Act of June 3, 1864.[13] It was called "An Act to provide a National Currency, secured by a pledge of United States Bonds and to provide for the Circulation and Redemption thereof." From this act, correlated with the Federal Reserve Act,[14] there has developed the present nationwide banking facilities. R. S. section 5153 makes these associations the depositories of public money. Though the national banks' usefulness as an agency to provide for currency has

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6 *Ibid.*

7 California Powder Works v. Davis, 151 U. S. 389, 393; Indiana *ex rel.* Anderson v. Brand, 303 U. S. 95, 98; cf. Owensboro National Bank v. Owensboro, 173 U. S. 664; Clement National Bank v. Vermont, 231 U. S. 120; Federal Land Bank v. Crosland, 261 U. S. 374.

8 299 U. S. 109.

9 Judicial Code, § 28.

10 Judicial Code, § 24.

11 Judicial Code, 237a.

12 299 U. S. at 115.

13 13 Stat. 100.

14 38 Stat. 251.

diminished markedly, their importance as general bankers shows a constant growth.[15] We may assume that national banks possess only the powers conferred by Congress.[16] These are set out in R. S. section 5136 as frequently amended and include "all such incidental powers as shall be necessary to carry on the business of banking," with the proviso "that in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus."[17] We have recently found the authority to secure federal funds within these incidental powers, coupled with a long continued practice recognized by the Comptroller of the Currency.[18] The right to accept special deposits is recognized by the banking act.[19] These are monies and other valuables the identical deposits of which are kept, preserved and returned in kind. It differs little if at all from a safe-deposit business. The language of the proviso of section 24, just quoted, is the language suitable to impose restrictions on a recognized power, not the language that would be used in creating a new power. As the limitation on the power to invest in real estate protected in a measure customers and stockholders from risky investments,[20] the banks own investment in safety deposit facilities evidently did not seem to Congress to require the same regulation as the purchase of stock in a safe-deposit corporation. A subsidiary safe-deposit corporation would give priority to the creditors of the

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[15] April 6, 1940, Treasury Daily Statement shows $172,081,172 in national bank notes outstanding on March 1, 1940. Compare with $1,122,452,661 outstanding October 31, 1914. Report of the Comptroller of Currency, 1935, p. 833. On March 1, 1940, there was outstanding over $5,000,000,000 in Federal Reserve notes.

The number of national banks as of October 31, 1938, is 5247, capital accounts (capital surplus and undivided profits) $3,305,575,000, and deposits $27,103,881,000. Report of the Comptroller of the Currency, 1938.

[16] Texas & Pacific Ry. *v.* Pottorff, 291 U. S. 245, 253; Marion *v.* Sneeden, 291 U. S. 262.

[17] 12 U. S. C. § 24.

[18] Inland Waterways Corporation, etc. *v.* Young, No. 6 this Term, decided March 25, 1940.

[19] R. S. 5228, 12 U. S. C. § 133.

[20] 12 U. S. C. § 29:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business."

subsidiary over the depositors and other creditors of the bank itself. The obvious fact, known to all, is that national banks do and for many years have carried on a safe-deposit business. State banks, quite usually, are given the power to conduct a safe-deposit business.[21] We agree with the appellant bank that such a generally adopted method of safeguarding valuables must be considered a banking function authorized by Congress.[22]

(3) We may assume, as did the Supreme Court of Colorado, that the tax is invalid, if laid upon the bank as an instrumentality of government in the incidents referred to in the preceding section;[23] that its banking operations are free from state taxation except as Congress may permit;[24] that Congress permits the taxation only of shares and real estate;[25] and that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness.[26]

Congress has not legislated against taxation of the customers of national banks. This court has approved a tax assessed upon the deposits of customers of national banks.[27] By section 6 of the Colo-

[21] Paton's Digest, 1926, Vol. 2, p. 2246, lists 24 states and territories which authorize their banks to conduct a safe deposit business. For example, Maine Act of 1923, c. 144, § 6, (V), authorizes savings banks to "own, maintain and let safe deposit boxes and vaults." Ohio, Gen. Code (1921), § 710-109, empowers banks to let out safe deposit boxes. California, Gen. Laws (1923), Act 652, § 30, any bank may conduct a safe deposit department, but shall not invest more than one tenth of its capital and surplus in such safe-deposit department.

[22] The language of the proviso first appeared in an act to further amend the national banking laws of the Federal Reserve Act enacted February 25, 1927, 44 Stat. 1224, section 2(b). Only immaterial verbal changes have occurred since the first adoption.

Referring to this proviso the House report said: "The second proviso regulates the safe-deposit business of national banks and prohibits them from investing an amount in excess of 15 per cent of capital and surplus in a corporation organized to conduct a safe-deposit business in connection with the bank. This is a business which is regularly carried on by national banks and the effect of this provision is also primarily regulative." H. Rep. No. 83, 69th Cong., 1st Sess., p. 4.

[23] Cf. Osborn v. U. S. Bank, 9 Wheat. 738, 862; Owensboro National Bank v. Owensboro, 173 U. S. 664, 668; Bank of California v. Richardson, 248 U. S. 476, 483. Also Smith v. Kansas City Title Co., 255 U. S. 180, 212.

[24] Farmers', etc. National Bank v. Dearing, 91 U. S. 29; Easton v. Iowa, 188 U. S. 220; First National Bank v. California, 262 U. S. 366.

[25] R. S. § 5219; Owensboro National Bank v. Owensboro, 173 U. S. 664, 668, 676.

[26] Pittman v. Home Owners Loan Corp., No. 10 this Term, decided November 6, 1939, and cases cited; James v. Dravo Contracting Co., 302 U. S. 134, 160; First National Bank v. Missouri, 263 U. S. 640, 656.

[27] Clement National Bank v. Vermont, 231 U. S. 120, 133.

rado act the "person rendering or performing services shall be liable"[1] for the payment of the tax imposed. But as subsection (b) of that same section requires the tax paid to be added to the charges for service "as a separate and distinct item" and makes it a debt from the user of the services until paid, the tax is upon the user of the safe deposit boxes, not upon the bank. Furthermore, as by section 2(h) credit is given to the bank for taxes paid on accounts subsequently found worthless and the bank is in a position to require payment of box rentals and taxes in advance, there is no occasion for a bank ever to have saddled upon it any part of the tax burden.

In *National Bank* v. *Commonwealth*[28] this Court determined a similar question in favor of the validity of the state tax. The case was decided in 1869. At that time the applicable federal statute[29] read: "*Section* 41. . . . *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person . . . , from being included in the valuation of the personal property of such person . . . in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere. . . ."

The statute of Kentucky laid a tax of fifty cents on each share. The same statute enacted: "The cashier of a bank, whose stock is taxed, shall, on the first day in July of each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent. upon the amount; and the said bank or corporation shall thereby forfeit the privileges of its charter."

A national bank refused payment on the ground that it as a bank was not subject to state taxation. It was decided that this was a tax on shares, that the state in a legal proceeding against the shareholder could have garnisheed the bank and that because the bank was a federal instrumentality was no reason for not requiring it to collect and pay over the money from the shareholder. A similar tax was upheld in *Des Moines Bank* v. *Fairweather*.[30]

The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself.[31] The funds which were received by the

[28] 9 Wall. 353.

[29] 13 Stat. 111.

[30] 263 U. S. 103, 111; cf. Gully v. First National Bank, 299 U. S. 109, 116.

[31] Stahmann v. Vidal, 305 U. S. 61.

State came from the assets of the user, not from those of the federal instrumentality, the bank.[32] The Colorado Supreme Court holds the user is the taxpayer.[33] The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling.[34] As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by section 12 of the act as the responsible obligor, we conclude the tax is upon him not upon the bank. The Constitution or laws of the United States do not forbid such a tax.

(4) The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality.[35] Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[32] Helvering v. Therrell, 303 U. S. 218, 225.

[33] Bedford v. Colorado Bank, 104 Colo. 311, 319; cf. Bedford v. Hartman Brothers, 104 Colo. 190, 194.

[34] Clement National Bank v. Vermont, 231 U. S. 120, 134.

[35] National Bank v. Commonwealth, 9 Wall. 353; Des Moines Bank v. Fairweather, 263 U. S. 103, 111; cf. Waite v. Dowley, 94 U. S. 527; Monamotor Oil Co. v. Johnson, 292 U. S. 86, 93; Code of Iowa, 1931, § 5093a(5); Felt & Tarrant Co. v. Gallagher, 306 U. S. 62, 68; McGoldrick v. Berwind-White Coal Co., No. 475 this Term, decided January 29, 1940.